

St. John's Law Review

Volume 47
Number 2 *Volume 47, December 1972, Number 2*

Article 11

August 2012

Airport Searches (United States v. Bell)

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1972) "Airport Searches (United States v. Bell)," *St. John's Law Review*: Vol. 47 : No. 2 , Article 11.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol47/iss2/11>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact seljbyc@stjohns.edu.

tice, the "*Feinberg* rule" was no longer followed by the courts within the Second Circuit.¹⁶⁵ However, an examination of recent decisions within the circuit reveals a more clouded picture. Earlier this year, in *United States v. Coblenz*,¹⁶⁶ the court reiterated the single preponderance of evidence standard as controlling within the circuit and refused to apply any other test for the submission of a case to the jury. However, many Second Circuit cases do reflect an abandonment of the single test and an adoption of the majority rule,¹⁶⁷ while other decisions express doubt as to which standard should govern and, therefore, have applied both.¹⁶⁸

The effect of *Taylor* will be to clear up the confusion within this circuit as to the standard of evidence necessary for submission of a criminal case to a jury. While it has been stated that proof of a defendant's guilt beyond a reasonable doubt is a basic proposition of our law, the evidentiary rule within this circuit has been clearly inconsistent with that concept.

Leaving *Feinberg* on the books thus creates a trap for district judges, a paper sword for prosecutors, and an *unwarranted burden upon criminal defendants*.¹⁶⁹

Having squarely confronted the problem, the *Taylor* court has removed the trap.

AIRPORT SEARCHES

United States v. Bell

In *United States v. Bell*¹⁷⁰ the Second Circuit faced the task of balancing the public danger posed by the current wave of airport hi-

¹⁶⁵ *Id.* at 244.

¹⁶⁶ 453 F.2d 503 (2d Cir.), *cert. denied*, 406 U.S. 917 (1972).

¹⁶⁷ See note 160 *supra*. These cases suggest that a complete abandonment of the *Feinberg* rule had already been effected within this circuit. *Contra*, *United States v. Coblenz*, 453 F.2d 503 (2d Cir. 1972).

¹⁶⁸ See *United States v. Leitner*, 202 F. Supp. 688 (S.D.N.Y. 1962), where the court found that "[the] test of sufficiency of the evidence for the jury in a criminal prosecution currently applicable within this circuit is not entirely free from doubt." *Id.* at 693. After a discussion of the authority in support of each rule, the court found its decision sustainable under either approach. In both *United States v. Monica*, 295 F.2d 400, 401 (2d Cir. 1961), *cert. denied*, 368 U.S. 953 (1962), and *United States v. Iannelli*, 461 F.2d 483, 486 n.4, (2d Cir. 1972), the court declined to decide which of the two standards to apply and proceeded to apply both.

Finding the level of proof established by the prosecution in these cases to be sufficient for the majority test enabled the courts to avoid the problem tackled in *Taylor*. However, the effect of these decisions was to invoke the majority approach without expressly overruling *Feinberg* since, in order to sustain a decision under both standards, the stricter majority test would have to be met. Having passed this test, approval under the *Feinberg* test would, of course, be automatic.

¹⁶⁹ 464 F.2d at 244 (emphasis added).

¹⁷⁰ 464 F.2d 667 (2d Cir. 1972).

jackings¹⁷¹ against the threat of intrusions upon individual privacy.¹⁷² Rather than state a broad rule, the court preferred to hand down a narrow decision limited to the particular facts before it. The court found four circumstances present to support its holding that a federal marshal's frisk of Henry Bell, an airline passenger, constituted a reasonable search under the fourth amendment.¹⁷³ First, the marshal

¹⁷¹ The first skyjacking occurred in 1931 during a revolution in Peru when a group of soldiers captured a Panagra airliner. The first case of skyjacking in the United States took place aboard a National Airlines plane bound from Miami to Key West. The hijacker rerouted the plane to land in Cuba. Before the year was out, four more American planes were seized by air pirates. Over the next six years there were only seven cases of skyjacking in the United States. Inexplicably, in 1968, 22 planes were skyjacked and during the following year, the number soared to 40. SATURDAY REVIEW, Aug. 26, 1972, at 47-48. In 1970 skyjackings decreased approximately 50 per cent from the level of the prior year, perhaps due to implementation of the federal anti-hijacking system. No flight fully protected by this program had been hijacked. *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971).

A stunning new element was added to the repertoire of the skyjacker in November of 1971. Previously, skyjackers managed only to delay or change the destination of the planes they seized in the United States, but now they began to demand huge ransoms as well. SATURDAY REVIEW, Aug. 26, 1972, at 48-49. In addition, many hijackers have recently attempted escapes by parachute. Benjamin Davis, head of the Department of Transportation's anti-skyjacking effort, has stated:

We have a whole new ballgame. It is essentially more violent and dangerous than the old one. Extortion on top of hijacking is adding dangers. There are more complications rounding up the money and parachutes.

Id. at 51.

Nearly twenty skyjackings have involved extortion as of July, 1972. *Id.*

¹⁷² See *United States v. Epperson*, 454 F.2d 769, 771 (4th Cir. 1972):

The reasonableness of any search must be determined by balancing the governmental interest in searching against the invasion of privacy which the search entails.

¹⁷³ Under the fourth amendment, a search warrant should be obtained, whenever practicable, from a neutral and detached magistrate. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *People v. Marshal*, 69 Cal. 2d 51, 442 P. 2d 665, 69 Cal. Rptr. 585 (1968). This requirement exists to assure a citizen of a deliberate and impartial judgment interposed between him and the police. See *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). Many critics feel that the current practice used to obtain a warrant is a far cry from the above ideal. See LaFave & Remington, *Controlling the Police: The Judges Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 992 (1965) stating that there is a lack of meaning in obtaining a warrant in large urban areas because judges, too often, will sign warrants automatically; Miller and Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practice*, 1964 WASH. U.L.Q. 1, 13 stating:

Traditionally magistrates have been laymen who might feel a certain diffidence in disputing the essentially legal conclusions reached by law-trained persons. Whether lawyers or laymen, magistrates do not have the investigational facilities available to prosecutors.

A frisk of an airline passenger about to board a plane clearly precludes the obtaining of a warrant due to the "exigencies of time" inherent in such a situation. *United States v. Bell*, 464 F.2d at 673. See *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971) which held that an airport hijacking search could only be justified under the protective frisk for weapons authorized by *Terry v. Ohio* since such a search was not incident to a lawful arrest nor did it fit within any of the other exceptions to the warrant requirement of the fourth amendment. These exceptions are as follows: If the subject consents to the search it is not unlawful without a warrant. See *Zap v. United States*, 328 U.S. 624, 628 (1946). Cf. Comment, *Airport Security Searches and the*

knew that Bell fitted the profile developed by the Federal Aviation Agency to identify potential hijackers;¹⁷⁴ second, Bell had activated a mechanical device known as a magnetometer used to detect the

Fourth Amendment, 71 COLUM. L. REV. 1039 (1971) [hereinafter *Airport Security*] which states that mere acquiescence does not establish consent. See also *United States v. Lopez*, 328 F. Supp. 1077, which points out that:

Consent to a search involves a relinquishment of fundamental constitutional rights and should not be lightly inferred.

Id. at 1092; *United States v. Smith*, 308 F.2d 657 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963):

A consent is not a voluntary one if it is the product of duress or coercion, actual or implied. Moreover, to be voluntary, a consent must have been unequivocal, specific and intelligently given.

Id. at 663; *Judd v. United States*, 190 F.2d 649 (D.C. Cir. 1951) (consent is not given by a suspect held in custody who tells the police that he does not mind if they search his house); *United States v. Lewis*, 274 F. Supp. 184 (S.D.N.Y. 1967) (if the consenter is subject to physical restriction by the officers his consent may not be valid); *Airport Security* at 1048-49 n.55, stating that:

In some courts at least, even assuming some form of waiver is recognized, failure to advise . . . of . . . Fourth Amendment rights will bar a prosecution claim of consent.

If there is an *emergency* a warrant is not needed. See *United States v. Jeffers*, 342 U.S. 48, 52 (1951); *McDonald v. United States*, 335 U.S. 451, 454 (1948).

Nor is a warrant needed when the situation involves evidence obtained through *hot pursuit* of fleeing felons, *Chapman v. United States*, 365 U.S. 610, 615 (1963); the seizure of evidence about to be *destroyed*, *McDonald v. United States*, 335 U.S. at 455; about to be *removed*, *United States v. Jeffers*, 342 U.S. at 52; lying in *plain sight*, *Harris v. United States*, 390 U.S. 234, 236 (1968).

¹⁷⁴ The Federal Aviation Agency profile is a misnomer. The profile was actually developed through the efforts of a joint task force consisting of representatives of the Justice and Commerce Departments as well as the Federal Aeronautics Administration. Individuals trained in several disciplines, including psychology, law, engineering and administration, participated. The group undertook a detailed study of the characteristics of all known hijackers and of the air traveling public. Background investigations of hijackers, together with visual and photographic studies of boarding passengers, were relied upon. *United States v. Lopez*, 328 F. Supp. at 1082.

Were even one characteristic of the profile revealed to the general public, its usefulness could be undermined by hijackers fabricating an acceptable profile. Because of this danger, courts have held in camera pre-trial hearings, excluding the public and the defendant from the courtroom when testimony revealing the specific characteristics of the profile is given. This practice has raised a serious constitutional question, i.e., a defendant's right to confront the witnesses against him. The Second Circuit, in the instant case, upheld the in camera procedure. The following factors were noted in support of this judgment:

- (1) the extra judicial statement of the unavailable witness which "normally invokes the invocation of the confrontation guarantee" was not at issue. Defendant's attorney was present to question the witness.
- (2) the in camera testimony bore no relationship to the question of Bell's guilt or innocence of the crime charged.
- (3) at a preliminary hearing, the accused is not given many of the same safeguards which are given him on trial. For example, hearsay evidence is admissible at a suppression hearing and the concealment of an informant's identity at such hearing has been upheld by the Supreme Court in *McCray v. Illinois*, 386 U.S. 300 (1967).
- (4) the continuing presence of the defendant even at his own trial is not an absolute right. See *Snyder v. Massachusetts*, 291 U.S. 97 (1934) (waiver); *Illinois v. Allen*, 397 U.S. 337 (1970) (disruptive courtroom behavior made defendant's removal necessary).

For an excellent discussion of the informer analogy applied in the context of an

presence of a weapon upon a person;¹⁷⁵ third, Bell had no personal identification; and fourth, he voluntarily told the marshal he was released on bail pending prosecution for narcotics and attempted murder.

Relying on *Terry v. Ohio*,¹⁷⁶ the court, in upholding the marshal's search as reasonable did not require a showing of probable cause.¹⁷⁷ In *Terry* the Supreme Court upheld a stop and frisk by a trained police officer who had a reasonable belief that a suspect carried a weapon which would endanger himself or others.¹⁷⁸ In the present case, the

airport hijacking, see Judge Weinstein's opinion in *United States v. Lopez*, 328 F. Supp. at 1090-92 which concludes:

[T]he instant case actually presents a stronger case for non-disclosure to the defendant because the informant is an objective system, not an individual who might be known to the defendant. He could not, by his presence, hope to impugn its credibility. Furthermore, since the level of probability required to justify a frisk is lower than "probable cause" there is a corresponding lower necessity for disclosure.

¹⁷⁵ The magnetometer is an electronic weapons detector which can be activated by a variety of metallic objects. Approximately fifty per cent of the persons who pass through such a device trigger its warning signal. However, the magnetometer retains its usefulness since it is only one of a series of steps utilized by the present anti-hijacking system. The total system, the main focus of which is on deterrence, consists of the following elements:

- 1.) heavy penalties
- 2.) notice to the public
- 3.) use of a passenger profile
- 4.) magnetometer
- 5.) interview by airline personnel
- 6.) interview by marshal
- 7.) frisk

See *United States v. Lopez*, 328 F. Supp. at 1083, for a description of how these elements interact.

¹⁷⁶ 392 U.S. 1 (1968).

¹⁷⁷ Airport hijacking cases have invariably relied upon the *Terry* precedent to uphold warrantless searches without probable cause. See, e.g., *United States v. Epperson*, 454 F.2d 769; *United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971); *United States v. Lopez*, 328 F. Supp. 1077.

¹⁷⁸ In the *Terry* decision, the reasonable belief that the suspects were armed was based upon the officer's personal observation that they were contemplating an armed robbery. 392 U.S. at 28. This belief was nurtured by the conduct of the suspects, i.e., their casual and oft-repeated reconnaissance of a store window.

Several subsequent cases have relied upon the *Terry* precedent to uphold investigative "seizures of the person" or protective frisks. In some cases, frisks resulted from information furnished by unknown informers. See, e.g., *United States v. Sims*, 450 F.2d 261 (4th Cir. 1971) (police discovered weapon upon suspect's person after an anonymous caller told the police he was forced at gunpoint to drive the suspect to the airport); *United States v. Unverzagt*, 424 F.2d 396 (8th Cir. 1970) (postal authorities "seized" the suspect by ordering him to step out of a men's washroom); *Ballou v. Massachusetts*, 403 F.2d 982 (1st Cir. 1968) (unknown informer's tip that suspect was armed, coupled with police officer's knowledge that suspect had served time on a gun carrying charge and was presently involved in a gangland feud, justified a frisk).

While a showing of probable cause is not required for an investigative "stop" or frisk for weapons, an

[unknown informant's] tip must be linked to other facts known by the police . . . to create the pre-requisite reasonable suspicion. . . .

Ballou v. Massachusetts, 403 F.2d at 986. Cf. *United States v. Bell*, 457 F.2d 1231, 1238

reasonable belief of the officer was based upon the objective results of the profile and the magnetometer¹⁷⁹ coupled with an admission of prior criminal behavior while the danger to others posed by a potential hijacker was self-evident.¹⁸⁰

Bell's significance lies in the court's conclusion that, in order to counteract the dangers of hijacking, an officer is permitted to go beyond the frisk even in situations where he does not feel an object which is the approximate size and shape of a gun or knife. By allowing the

(5th Cir. 1972), holding that absent establishment of the reliability of the informer, investigations "may not reflect anything more than idle rumor or irresponsible conjecture."

It is difficult to discern any notable difference between the evidence required to establish probable cause for the issuance of a search warrant and that necessary to sustain a policeman's frisk in light of the Supreme Court's decision in *United States v. Harris*, 403 U.S. 573 (1971). The Court held that an averment of previous reliability was not necessary when a supporting affidavit disclosed personal and recent observations of criminal activity by an informant known to the police but unknown to the magistrate.

Many cases have dealt with investigations and protective searches of automobile drivers and occupants in the wake of the *Terry* decision. See, e.g., *United States v. Jackson*, 448 F.2d 963 (9th Cir. 1971) (upheld investigation of three Negroes in a car based upon report that a nearby liquor store had been robbed by two Negroes. Police thought the third suspect could have been a lookout); *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971) (upheld frisk of passengers where the police had antecedent reasons to suspect the driver was armed); *United States v. Davis*, 441 F.2d 28 (9th Cir. 1971) (barred evidence resulting from a protective search made after the suspect had committed three traffic violations); *United States v. Collins*, 439 F.2d 610 (D.C. Cir. 1971) (barred evidence resulting from a search made in response to furtive gestures by passengers of a car); *United States v. Harflinger*, 436 F.2d 928 (8th Cir. 1970) (upheld the investigation and search of suspects who were driving in the early morning hours with non-local license plates in such a fashion that they appeared to be reconnoitering); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969) (upheld search upon similar facts). Compare *United States v. Marshall*, 440 F.2d 195 (D.C. Cir.), cert. denied, 400 U.S. 909 (1970) with *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971). See generally LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters & Beyond*, 67 MICH. L. REV. 40 (1968).

¹⁷⁹ Compare this situation with searches conducted as the result of an informant's tip. See cases cited in note 9 *supra*.

¹⁸⁰ Congress was aroused as early as 1961 by the first wave of American hijackings. See 107 CONG. REC. 14475-78 (Aug. 3, 1961). A new law was swiftly enacted to create the federal crime of "air piracy" whether or not the flight crossed state lines or the offense took place over the high seas. This legislation also punished attempts to commit air piracy, interference with flight crew members or flight attendants and the carrying of weapons aboard aircraft. Pub. L. 87-197, 75 Stat. 466 (Sept. 5, 1961) codified in 49 U.S.C. § 1472 (1970). See *United States v. Brown*, 305 F. Supp. 415 (W.D. Tex. 1969), where defendant was convicted of carrying a concealed weapon while attempting to board an aircraft in violation of 49 U.S.C. § 1472 (1). The court quite broadly construed an attempt to board an aircraft to encompass mere surrender of the airline ticket at the customer service desk and the subsequent entry into the departure lounge for the flight covered by that ticket.

This attempt by Congress to define a precise offense and prescribe stiff uniform penalties has failed both as a deterrent to potential hijackers and as an effective tool of law enforcement. In the period 1961-1971 there have been 117 incidents involving aircraft of United States registry. Thirty-two individuals have been brought to trial in federal court in the United States in connection with hijacking of United States airplanes while ninety-two persons are listed as fugitives. LOWENFELD, *AVIATION LAW*, ch. 7, at 21-22 (1972). See generally Volpi & Stewart, *Aircraft Hijackings: Some Domestic and International Responses*, 59 Ky. L.J. 273 (1971).

officer to further examine an object that felt like "hard lumps" in a pat down, on the ground that it could be gunpowder or some other explosive,¹⁸¹ the Second Circuit has sanctioned a broader search after a frisk since any object within a pocket could be an explosive. The decision in *Bell* carved out an exception to the Second Circuit's interpretation of the *Terry* rule in situations involving airport security while leaving untouched the restrictions upon which the scope of the search in the traditional setting of a street encounter between police officer and suspect. This was indicated when only two weeks subsequent to the *Bell* case, in *United States v. Del Toro*,¹⁸² the court held that a ten dollar bill folded to a size of two inches by three-quarters of an inch containing 2.2 grams of cocaine could not reasonably have aroused the suspicion of a weapon when such an object was discovered in the handkerchief pocket of a suit.¹⁸³

The *Del Toro* case illustrates that the *Terry* rule is composed of two distinct requirements: first, the initial frisk must be reasonable under the circumstances; and second, the pat down must be limited in scope to a search for weapons.¹⁸⁴ The *Bell* decision clearly expands the

¹⁸¹ 464 F.2d at 674.

¹⁸² 464 F.2d 520 (2d Cir. 1972).

¹⁸³ *Id.* at 521. A conceptual problem in formulating a rule for frisks is that the policeman, assuming his good faith, acts subjectively based upon his own immediate sense of risk to himself and others around him while the court testing his action for purposes of admissibility, uses an objective standard — what a reasonably prudent policeman in his position would do. The deterrent effect of the exclusionary rule is questionable since a policeman must act instinctively when he encounters a suspect. On the other hand, an objective rule "provides some insurance against dishonesty by the policeman who does not in fact have reason to suspect that the suspect is armed, but who would be willing to fabricate his remembered emotions to validate a productive frisk." *United States v. Lopez*, 328 F. Supp. at 1096. This watchdog role of the courts is of much significance because of the rule that a proper frisk permits seizure of non-weapon contraband.

Judge Moore, in his dissenting opinion in the *Del Toro* case, sharply criticizes the objective approach taken by the court:

Here is another illustration . . . of an appellate court, writing in the comparative safety of its chambers, telling an experienced Federal Narcotics Agent what his subjective reaction should have been when the Agent, during a legitimate "frisk," discovered an object in the pocket of a companion of a just-arrested drug dealer. It was the Agent's concern as to the object and at that time, not months later on a suppression hearing, that should be the relevant focus of our inquiry.

464 F.2d at 523.

¹⁸⁴ This distinction is apparent since *Del Toro* held that a pat down for weapons was justified under the circumstances while it simultaneously stated that a limited search for weapons had degenerated into an unrelated and unreasonable search for evidence. One hijacking search case has also adopted the two-step reasoning process implemented in *Terry*:

The interests must be balanced at two stages: the search must be justified at its inception and reasonably related in scope to the circumstances which justified the interference in the first place.

United States v. Epperson, 454 F.2d at 771.

permissible scope of a frisk for weapons but narrowly confines such an extension to situations involving airport security.

Chief Judge Friendly and Judge Mansfield wrote sharply divergent concurring opinions which discussed the first *Terry* requirement, i.e., that a frisk for weapons must be reasonable under the circumstances, an issue narrowly decided in the main opinion. Although both judges ostensibly agreed that the test of reasonableness required a weighing of the private harm against the public need for a search, they differed as to how to strike the balance.¹⁸⁵

Judge Friendly, after noting that the criminal activity in *Terry* involved the burglary of a single store concluded:

When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating . . . of a large airplane, the danger *alone* meets the test of reasonableness.¹⁸⁶

Judge Mulligan, as the author of the *Bell* opinion, has correctly recognized that an airline weapons frisk is unlikely to degenerate into an unrelated search for evidence of other crimes. A federal marshal would be unfaithful to his duty if he failed to check for explosive devices after his suspicions were aroused. See *United States v. Sims*, 450 F.2d at 263 (upheld seizure of an attache case after suspect was arrested for carrying a gun at an airport). But see *N.Y. Times*, Dec. 11, 1972 at —, col. 1, which reports a federal district judge's ruling in California that evidence of another crime found in an anti-hijacking search is inadmissible unless the passenger is informed that he can refuse to be searched.

¹⁸⁵ See Player, *Warrantless Searches and Seizures*, 5 GEO. L. REV. 269 (1971) defining balancing as follows:

Many factors would be taken into account including the seriousness of the offence, the absolute need to conduct this type of investigation, the nature of the locale, activities of the suspect, the danger to the public if immediate action is not taken, the nature and length of detection, and the harm to the suspect.

Id. at 277.

See also LaFave, "*Street Encounters*" and the Constitution: *Terry*, *Sibron*, *Peters & Beyond*, 67 MICH. L. REV. 40, 57 (1968) which emphasizes the seriousness of the offense. But see H. Schwartz, *Stop and Frisk — A Case Study in Judicial Control of the Police*, 58 J. CRIM. L.C. & P.S. 433 (1967) fearing that:

[I]f the policeman's "balancing" turns out to produce evidence of crime how many courts will be ready to find that he balanced wrongly . . . ?

Id. at 448.

See *United States v. Davis*, 441 F.2d at 31 (Trask, J., dissenting), approving a policeman's cursory search of every person he stopped on the ground that the officer thought it necessary to his personal safety.

¹⁸⁶ 464 F.2d at 675.

Judge Friendly would impose three requirements upon an airline weapons search:

(1) good faith

(2) reasonable scope

(3) advance notice to passengers that they will be searched to enable them to avoid the search by choosing not to travel by air.

Cf. *United States v. Lopez*, 328 F. Supp. at 1093:

Nor can the government properly argue that it can condition the exercise of the defendant's constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights. Implied consent under such circumstances would be inherently coercive. (citations omitted).

This view would allow a weapons search of all airline passengers and their baggage¹⁸⁷ and would consider the use of a hijacker profile and magnetometer test as a "self-imposed expedient" rather than a necessary element to legitimize a particular search. Thus, since all passengers can be searched, a fortiori no constitutional barrier prevents searching only certain ones based upon "trained intuition."¹⁸⁸ In his closing argument, Judge Friendly urged courts to

say nothing that would create doubt concerning the legality of wider or less precise measures when and if these should prove to be needed.¹⁸⁹

Judge Mansfield, on the other hand, rejects a broad search of all passengers and would require "grounds for suspecting that the pas-

See Airport Security, at 1049, stating that passage cannot be conditioned upon surrender of fourth amendment rights since

[i]t has been deemed improper to condition public assistance benefits, unemployment compensation, tax exemptions, and public employment upon the surrender of constitutional guarantees (citations omitted).

¹⁸⁷ American Airlines and Trans World Airlines have announced that they will soon begin inspecting the hand luggage of *all* boarding passengers in a new effort to deter hijacking. They will become the nation's first airlines, other than shuttle lines, to search the purses, briefcases and packages of every passenger. Airline sources said that recent market surveys had shown that hijacking jitters were having a measurable effect on the nation's air traffic. *N.Y. Times*, Aug. 30, 1972, at 1, col. 5. This announcement, together with spot checks and other security measures previously in effect, will mean that about 175,000 of the nation's 500,000 average daily passenger volume will be subjected to searches of their carry-on baggage and in most cases to an electronic search of their person. American Airlines estimated that the new security measures would cost it more than \$2 million annually in extra manpower expenses. Industry spokesmen said previous experience had indicated that most passengers did not object to the delays if the searches meant better security. *Id.* at 73, col. 7, 8.

The Federal Aviation Agency's anti-hijacking program, had, until recently proven highly successful. *See United States v. Lopez*, 328 F. Supp. at 1084; *United States v. Bell*, 464 F.2d at 676 (Mansfield, J., concurring). Yet the major criticism of the program is that the airlines are not compelled by law to search passengers and their baggage. *SATURDAY REVIEW*, Aug. 26, 1972, at 52, col. 2. *See also N.Y. Times*, Aug. 31, 1972, at 32, col. 2 (editorial):

These are not just services which responsible airlines should provide. They are basic precautions which air travelers have every right to insist upon. This criticism was met by a government announcement that beginning January 5, 1973, airlines would have to inspect all carry on luggage and screen every passenger. Local policemen rather than federal marshals will enforce these new measures. *N.Y. Times*, Dec. 11, 1972, at —, col. 1.

It could be argued that an airport search conducted by airline rather than government personnel is not restricted by the fourth amendment guarantees. The new measures instituted by American and Trans World Airlines may bring this issue to the fore. The requirements of the fourth amendment could reach the airlines through the government's commercial aviation involvement. Some examples are the leasing of land to the airports, regulation of rates, assignment of flight patterns and the close cooperation between airport personnel and federal marshals in implementing the anti-hijacking programs. *See Airport Security* at 1044-45. *But cf. Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

¹⁸⁸ *See United States v. Lindsey*, 451 F.2d 701 (3d Cir. 1971).

¹⁸⁹ 464 F.2d at 675 (Friendly, J., concurring).

sengers searched are potential hijackers.”¹⁹⁰ He reasons that if a “public-danger-alone” test is substituted for traditional fourth amendment standards in airport searches, an erosion of individual rights would be likely to result since this rationale could be extended to searches of persons or homes in high crime areas.¹⁹¹ Judge Mansfield clearly feels that the judicial branch should react calmly in the face of new threats to the public and he notes that

the ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike.¹⁹²

Underlying Judge Mansfield's argument is his feeling that the hijacking problem will not require any greater deterrent than a wider application of the *present anti-hijacking system*.¹⁹³

¹⁹⁰ *Id.* (Mansfield, J., concurring). Judge Mansfield's view was adopted in an earlier airport weapons search decision. See *United States v. Lopez*, 328 F. Supp. 1077, where the court felt the issue was whether the Federal Aviation Agency's screening procedure produces sufficient information to justify a cursory weapons search. The *Lopez* decision offered the following dictum:

Even the use of the magnetometer might be an objectionable intrusion where it not accompanied by an antecedent warning from the profile indicating a need to focus particular attention on the subject. We do not now decide whether, in absence of some prior indication of danger, the government may validly require any citizen to pass through an electronic device which probes beneath his clothing and effects to reveal what he carries with him.

Id. at 1100.

¹⁹¹ 464 F.2d at 675-76.

¹⁹² *Id.* at 676.

¹⁹³ Three distinct deterrent efforts have been undertaken to control aircraft hijackings. One attempted solution has made use of sky marshals and other in-flight security measures. This program was enacted in response to the events of Sept. 6, 1970, when four jets bound for New York with more than six hundred passengers aboard were hijacked over Europe by an Arab guerrilla group. *N.Y. Times* Sept. 7, 1970, at 1, col. 4. President Nixon announced that 1300 armed agents travelling incognito would be placed aboard airliners that flew the routes that had proved most vulnerable to skyjacking in the past. This \$30 million federal program did not prevent twenty-seven skyjackings during the following year — the same number that had occurred over the previous twelve month period when there were no sky marshals. In one instance, a sky marshal was aboard a hijacked airliner but he took no action for fear of endangering the life of a hostage. The sky marshal program has been cut back by transferring many marshals to ground security positions. *SATURDAY REVIEW*, Aug. 26, 1972 at 51-52. See also *AVIATION WEEK AND SPACE TECHNOLOGY*, Sept. 28, 1970 at 26; *Id.* Nov. 9, 1970 at 29; 35 Fed. Reg. 14839 (Sept. 24, 1970) issuing 14 C.F.R. § 224.2a (background information concerning the sky marshal program).

A second approach to the skyjacking problem seeks an international treaty to provide for the punishment or prompt extradition of all air pirates. The United States and Canada this summer drafted a treaty under which signatory nations would collectively halt commercial air service to any country that did not punish or extradite hijackers, or did not promptly release hijacked planes, crewmen and passengers. Delegates to a seventeen nation air conference rejected this proposal. France and Great Britain resisted this proposal because it amounts to a fundamental departure from current standards of international law on the matter of sanctions. In addition, both countries have economic interests in the Middle East which might be adversely affected by such a treaty. The Soviet Union opposed the treaty by arguing that joint sanctions should be imposed only by the United Nations Security Council. Evidently, the Soviet Union is unwilling to relinquish its sovereignty

While no circuit court has specifically decided whether a frisk of all passengers is constitutionally permissible,¹⁹⁴ precedent does exist for Judge Friendly's view that a search of some airline passengers can be based on nothing more than an experienced officer's intuition. In *United States v. Lindsey*,¹⁹⁵ the Third Circuit Court of Appeals held that defendant's use of four different names, his anxious behavior, and the apparent presence of a hard object in his coat pocket provided a sufficient basis for a federal marshal to stop and frisk the defendant. Applying *Terry* to these facts, the Third Circuit stated:

In the context of a possible airplane hijacking with the enormous

over this matter. See N.Y. Times, Sept. 6, 1972 at 91, col. 3. For an excellent discussion of some of the problems faced in drafting an international hijacking treaty, see LOWENFIELD, AVIATION LAW ch. 7 at 16-18 (1972). For a discussion of the unilateral action taken by the United States to provide for the punishment of skyjackers, see note 11 *supra*.

A third response to the hijacking problem seeks to prevent potential hijackers from bringing weapons aboard the aircraft they plan to seize. The Federal Aviation Anti-Hijacking program was designed to attain this objective. This program, however, has two vital weaknesses; first, it is necessarily limited to aircraft boardings within the United States and second, there is neither sufficient money nor manpower available to fully implement the program.

The Senate recently passed a bill which authorized \$35 million dollars a year for a new airport security force to screen all passengers and carry-on luggage S. 2280, 92 Cong., 2d Sess. (1972). White House lobbying succeeded in getting the House Committee to drop these screening provisions from its bill. The administration feels that local law enforcement agencies and airlines should be responsible for detecting potential skyjackers. NEWSDAY, Sept. 29, 1972, at 60 (editorial). Until early 1972, the F.A.A. anti-hijacking program was voluntary. All airlines protected some flights but none protected all. Following one apparently successful and several unsuccessful attempts by hijackers to extort money and then parachute from the plane, the F.A.A. issued an emergency rule requiring all air carriers to implement the system, 14 C.F.R. § 121.538 (issued Jan. 31, 1972), 37 Fed. Reg. 2500, Feb. 2, 1972.

Critics inaccurately complain that the airlines are not compelled by law to conduct airport searches. See, e.g., SATURDAY REVIEW, Aug. 26, 1972 at 52. The important question is whether the Federal anti-hijacking system is an effective deterrent against hijackings which may occur on planes boarded by passengers in the United States since this method of deterrence cannot affect flights which originate outside the United States even if they are made by planes under American registry.

As of September 1972, twenty-five airliners from thirteen countries have been successfully hijacked this year, resulting in the deaths of 140 passengers and crew members. NEWSDAY, Sept. 29, 1972, at 60 (editorial). It must be determined which, if any, of these hijackings could have been prevented by unilateral American action. Only after such an analysis is made, could it be said that greater deterrent efforts are needed on the national level. Whether the government or the airlines should bear the major burden of either the present or future deterrent efforts is a separate issue.

194 Cf. *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972), where the court upheld a search of the defendant's jacket based upon the activation of the magnetometer alone. *Epperson* might be read broadly as justifying a search of all passengers but its language indicates otherwise:

The use of the device, [magnetometer] unlike frisking cannot possibly be an annoying, frightening and perhaps humiliating experience.

Id. at 771.

The marshal's frisk was reasonable only after *Epperson* had activated the magnetometer, removed certain objects from his pocket and once again triggered the device.

195 451 F.2d 701 (3d Cir. 1971).

consequences which may flow there-from, and in view of the limited time [the marshal] had to act, the level of suspicion required for a *Terry* investigative stop and protective search should be lowered.¹⁹⁶

Judge Mansfield's concern for the traditional standards of the fourth amendment may be misplaced in view of the variable nature of that amendment's standard of reasonableness. While probable cause and a search warrant are often required for a search not incident to a valid arrest, several exceptions to this general rule do, in fact, exist. Judicially sanctioned statutes¹⁹⁷ give customs agents and officials broad authority to search without a warrant and the Second Circuit itself has held that "mere suspicion of illegal activity within their jurisdiction is enough 'cause' to permit a customs officer to stop and search a person."¹⁹⁸ This boarder search exception was developed to assist in excluding contraband from entering the country and, unlike the newly emerging problem of airport hijackings, the customs search rule is based on practical and historical considerations which antedate adoption of the constitutional amendments.¹⁹⁹ However, Judge Weinstein, of the Eastern District of New York, has carefully limited the border search exception to imported goods and persons entering the country while retaining the probable cause requirement for exit searches.²⁰⁰

¹⁹⁶ *Id.* at 703.

¹⁹⁷ 19 U.S.C. § 482 (stop, search, and examine any vehicle, beast or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law); 19 U.S.C. § 1496 (examination of the baggage of any person arriving in the United States); 19 U.S.C. § 1499 (inspection, examination and appraisal of imported merchandise); 19 U.S.C. § 1582 (search by authorized officers or agents of all persons coming into the United States); 19 U.S.C. § 1581 (boarding of any vessel or vehicle at any place and search any cargo on board).

Several cases have upheld and interpreted the border search exception provided by the statutes. *See, e.g.*, *United States v. Glaziov*, 402 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); *Thomas v. United States*, 372 F.2d 252 (5th Cir. 1967); *Alexander v. United States*, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); *Landau v. United States Attorney*, 82 F.2d 285 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936).

¹⁹⁸ *United States v. Glaziov*, 402 F.2d at 12.

¹⁹⁹ Border searches were authorized by the Judiciary Act of July 31, 1789, 1 Stat. 29, 43, which permitted customs officers:

To enter any ship or vessel in which they shall have reason to suspect any goods . . . subject to duty shall be concealed; and therein to search for, seize, and secure any such goods.

See Boyd v. United States, 116 U.S. 616 (1886), which points out that since the Judiciary Act of 1789

was passed by the same Congress which proposed for adoption the original amendments to the Constitution it is clear that the members of that body did not regard search and seizure of this kind as unreasonable and they are not embraced within the prohibition of the [fourth] amendment.

Id. at 623.

²⁰⁰ *United States v. Marti*, 327 F. Supp. 59 (E.D.N.Y. 1970).

The only reasonable explanation for such a distinction is that the public danger is greater in the former circumstance. One can argue by analogy that the potential harm to the public, coupled with the damage threatened to a billion dollar industry, requires a low level of a suspicion akin to trained intuition be adopted as the proper fourth amendment standard to meet the unique situation.

A frisk of all airline passengers, however, is more difficult to justify because an officer's suspicion or trained intuition is not involved. One circuit court has upheld an electronic weapons search of all passengers²⁰¹ by reasoning that such an intrusion lacks the annoyance or humiliation of a physical search. But an initial frisk of all passengers without the prior use of a magnetometer to create an element of suspicion is of doubtful constitutionality.²⁰² Under the *Terry* rule, an officer must be able to point to specific and articulable facts to justify the limited intrusion of a frisk for weapons.²⁰³ The present anti-hijacking system provides statistics which show the precise probabilities involved when a suspect is frisked. A frisk of all passengers and their baggage, on the other hand, is not even based upon an inarticulate hunch. An extension of the *Terry* rule to allow a lower level of suspicion in airport weapons searches could not logically permit a search of all passengers.

A more satisfactory legal basis for upholding a search of all passengers may be found by examining those cases which have upheld area-wide inspection of dwellings.²⁰⁴ Such inspections are justified as the only effective means of protecting the public health and safety.²⁰⁵

²⁰¹ *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972), discussed in note 194 *supra*.
Cf. *Katz v. United States*, 389 U.S. 347 (1967) (electronic eavesdropping):

[T]he reach of [the fourth amendment] cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
Id. at 353.

²⁰² Cf. *Airport Security* at 1057:

[W]hether [*Terry*] legitimizes the use of the magnetometer on all passengers is a more difficult question. The personality profile is apparently of only limited accuracy. Yet it does provide some marginal basis for reasonable suspicion. Thus, unless it can be established that the protection of airline passengers and property would be frustrated by a requirement that the use of the magnetometer be limited to those passengers who are adjudged suspect based upon application of the profile analysis, such a requirement may well be found constitutionally required. . . .

²⁰³ 392 U.S. at 21.

²⁰⁴ *Camara v. Municipal Ct. of San Francisco*, 387 U.S. 523 (1967). In *Camara*, a person was charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. The Court reversed his conviction by holding that he had a constitutional right to insist that the inspectors obtain a warrant. In dictum, the Court rejected the argument that warrants should issue only when the inspector possesses probable cause to believe that a particular dwelling contains housing code violations.

²⁰⁵ *Id.* at 535-36.

Similar to hijacking searches, these inspections are limited to a narrowly defined class and are aimed at deterrence rather than evidence gathering.²⁰⁶ Establishing a level of suspicion for a particular building is unnecessary under this approach. If this analogy is accepted by the courts, the government would be required to show that the present anti-hijacking system is an unsatisfactory security measure before they could introduce as evidence the fruits of the search of all passengers and their baggage. In determining whether the government has met this burden, courts could use congressional legislation as a guide. The Senate has passed a measure declaring that

[t]he United States air transportation system continues to be vulnerable to violence and air piracy because of inadequate security and a continuing failure to properly identify and arrest persons attempting to violate Federal law relating to crimes against air transportation.²⁰⁷

To remedy this situation, the bill authorizes government personnel to search any person or property aboard or attempting to board an aircraft. The bill also mandates the issuance of regulations requiring the use of weapons detection devices upon all passengers and provide the funds necessary for this purpose in recognition of the United States government's primary responsibility to guarantee and insure safety to the millions of passengers who use air transportation.

The House of Representatives has refused to include these provisions in its bill, thereby weakening any inference which courts could draw from legislation dealing with airport weapons searches.

While congressional legislation is a reaction to the dangers posed by hijackings, courts must consider the dangers posed to individual liberties by governmental invasions of privacy. Judge Friendly's "danger alone" test ignores the latter consideration. The "danger alone" rationale was used in the past to justify the internment of Japanese-Americans during World War II. The "danger alone" rationale has supported the tactic of mass arrests of young people to avoid disruption of government business in Washington D.C. The test proposed by Judge Friendly contains these unsavory connotations and

²⁰⁶ *Id.* at 537. The Court noted that:

A number of persuasive factors combine to support the reasonableness of area code enforcement inspections. First, such programs have a long history of judicial and public acceptance. Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

Id.

²⁰⁷ Air Transportation Security Act of 1972, S. 2280, 92d Cong., 2d Sess. (1972).

such language should be scrupulously avoided. On the other hand, a constitutionally permissible search of all airline passengers may be a desirable result. A decision which upholds the constitutionality of such searches should stress the limited nature of the invasion of privacy. Surveys have shown that most airline passengers, the class victim of weapons searches, welcome them. Passengers feel that the minor inconvenience of the search is outweighed by the assurance of a safe flight.²⁰⁸ By employing a true balancing test which carefully considers the consequences to the individual victims of a search as well as the public danger, courts will not only achieve a desirable result but also a satisfactory legal theory for reaching that result.

AUTHORIZATION OF WIRETAPS

United States v. Pisacano

Title III of the Omnibus Crime Control and Safe Streets Act of 1968²⁰⁹ legalized, within narrowly defined limits,²¹⁰ wiretapping by federal and state authorities in investigating certain types of crimes.²¹¹ Drawn to comply with constitutional standards enunciated in *Berger v. New York*²¹² and *Katz v. United States*,²¹³ it provides that authorization for the interception of wire or oral communications must be granted by a federal judge of competent jurisdiction upon an application authorized by "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General."²¹⁴ According

²⁰⁸ See N.Y. Times, Aug. 30, 1972, at 73, col. 7.

²⁰⁹ Pub. L. No. 90-351, 82 Stat. 197, 211-223 (partially codified at 18 U.S.C. §§ 2510-20 (1970)) [hereinafter Title III].

²¹⁰ See 18 U.S.C. § 2516, 2518(1)-(8) (1970).

²¹¹ All crimes to which Title III is applicable are listed at 18 U.S.C. § 2516(1)(a)-(g) (1971).

²¹² 388 U.S. 41 (1967).

In *Berger*, a New York statute permitting eavesdropping was declared invalid for want of "adequate judicial supervision or protective procedure." *Id.* at 60. Specifically, the Court objected to the following facts: (1) the warrant required no particularity as to the specific crime being investigated or anticipated; (2) prolonged eavesdropping would be "equivalent to a series of intrusions . . . pursuant to a single showing of probable cause;" (3) no termination date for the authorization was required; (4) there was no requirement for notice as is present in conventional warrants.

²¹³ 389 U.S. 347 (1967).

Katz suggested that "[a] duly authorized magistrate . . . could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." *Id.* at 353 (emphasis added). The "limited search and seizure" referred to was eavesdropping with the use of an electronic device placed on the top of a public telephone booth regularly used by the defendant.

That the drafters of Title III had the *Berger* and *Katz* decisions in mind is reflected in the accompanying Senate report: "Title III was drafted to meet these [constitutional] standards and to conform with *Katz v. United States*. . . ." S. REP. No. 1097, 90th Cong., 2d Sess., 2 U.S. CODE CONG. AND AD. NEWS, 2153 (1968).

²¹⁴ 18 U.S.C. § 2516(1) (1970).